88-847

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ___

In The

Supreme Court of the United States

October Term, 1988

OSCAR SIMS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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41pp

QUESTIONS PRESENTED

(a) Whether the Petitioner's constitutional rights, as guaranteed under the Constitution of the State of Alabama and the United States Constitution, to a thorough and sifting cross-examination of the alleged victim was violated by the trial court's unilateral denial of the Petitioner's line of cross-examination as to the motive underlying the alleged victim's testimony?

(b) Whether the Alabama Supreme Court failed to properly examine the Petitioner's claim that he was denied effective assistance of counsel in the trial court under the parameters as set forth in *Zuck v. State*, 588 F.2d 436, 440 which states "that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny".

PARTIES

The following list contains the names of all parties to the proceedings in the Courts below.

1. Chief Justice C. C. Torbert
   Associate Justice Gorman Houston
   Associate Justice Hugh Maddox
   Associate Justice Reneau P. Almon
   Associate Justice Sam A. Beatty
   Supreme Court of Alabama
   Post Office Box 218
   Montgomery, Alabama 36101

2. Presiding Judge William M. Bowen, Jr.
   Judge John Tyson, III
   Judge Sam Taylor
   Judge John Patterson
   Judge H. Ward McMillan
   Alabama Court of Criminal Appeals
   Post Office Box 351
   Montgomery, Alabama 36101

3. Judge William H. Baldwin
   Circuit Court Judge of Covington County, Alabama
   Covington County Courthouse
   Andalusia, Alabama 36420

4. The Honorable Eugina Loggins
   District Attorney for Covington County, Alabama
   Covington County Courthouse
   Andalusia, Alabama 36420

5. Mr. Larry R. Grissett
   Attorney at Law
   Post Office Box 423
   Opp, Alabama 36467

6. The caption contains the names of all other parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The Certificate of Judgment of the Supreme Court of Alabama denying Petitioner's Petition for Writ of Certiorari is reproduced as Appendix A.[1]

2. The Order of the Alabama Court of Criminal Appeals overruling Petitioner's Application for Rehearing and the Request for Finding of Additional Facts is reproduced as Appendix B.

3. The Order of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction without an opinion is reproduced as Appendix C.

4. Petitioner's Notice of Appeal is reproduced as Appendix D.

5. The Petitioner's Judgment of Sentence is reproduced as Appendix E.

6. The Petitioner's conviction is reproduced as Appendix F.

JURISDICTION

The judgment of the Alabama Supreme Court, which is sought to be reviewed, was rendered on July 15, 1988. See Appendix A. Petitioner avers that the jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

[1] The appendix to this petition is separately bound pursuant to Rule 21.1(k).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution:

> " . . . no State shall . . . deprive any person of life, liberty or property, without due process of law . . . "

STATEMENT OF THE CASE

THE FACTS

Oscar Sims, the Petitioner, was indicted for the offense of rape in the second degree. (CR. 1, 54).[2] Petitioner entered a plea of not guilty and has maintained his innocence throughout the course of these proceedings. (CR. 4).

Only one pre-trial motion was filed by defense counsel, namely, a Motion to Produce. (CR. 5-6).

The alleged victim in this cause is the daughter of Petitioner. (R. 7). She stated that her parents were in the

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[2] The facts recited are generally taken from the Clerk's Record and the trial court's transcript. References to pages in the Clerk's Record shall be begun by "CR" and references to pages in the transcript shall be begun by "R".

process of obtaining a divorce at the time of the alleged incident. (R. 11). She further stated that on the evening of the alleged incident her father, Petitioner, had informed her of his intent to follow through with the divorce and, subsequently, his intent to marry a much younger woman. (R. 10). The witness admitted being upset over her parents' divorce action. (R. 11).

The alleged victim recalled having testified at her parents' divorce hearing. (R. 32). The State objected to any further questioning along that line based on relevancy. (R. 32). The trial court indicated that it would sustain the objection to any further questioning in regard to the divorce. (R. 32). Defense counsel requested an opportunity to make an offer of proof as to the witness' previous testimony. (R. 32). A "document" was handed to the trial judge and a bench conference occurred outside the hearing of the court reporter. (R. 33). The trial court then sustained the State's objection to this line of questioning. (R. 33).

There was no Motion for Judgment of Acquittal at the close of the State's evidence nor after the close of the State's rebuttal testimony. Only one jury instruction was submitted by the defense to the court and said instruction, concerning reasonable doubt, was refused by the trial court. (CR. 15).

PROCEEDINGS BELOW

Petitioner was indicted for the offense of rape in the second degree, a violation of Section 13A-6-62, Code of Alabama, (1975). Oscar Sims entered a plea of not guilty

to the offense by filing a written plea of not guilty and waiver of arraignment. (CR. 4). Only one pre-trial motion was filed by defense counsel, namely, a Motion to Produce. (CR. 5-6).

On April 29, 1987, defense counsel filed requested voir dire questions and one requested jury instruction. (CR. 13-15). Trial commenced on April 29, 1987, with the prosecutrix, daughter of Petitioner, being the only witness to testify on behalf of the State. (R. 7-47). The defense called four witnesses including the Petitioner. (R. 49-106). One rebuttal witness was called on behalf of the State. (R. 106-108).

Oscar Sims was found guilty as charged after twenty eight minutes of deliberation by the jury. (R. 118-119). Sentencing was postponed pending a pre-sentence investigation. (R. 120).

The Sentencing Hearing was held on June 8, 1987, at which time Oscar Sims was sentenced to ten (10) years in the State Penitentiary. (R. 124-125). Oral Notice of Intent to Appeal was given at completion of the Sentencing Hearing. (R. 125). At this point, the trial court determined Oscar Sims to be indigent and appointed trial counsel, the Honorable Larry Grissett, to represent him on appeal. (CR. 49). A Motion for New Trial was filed on behalf of Oscar Sims and denied by operation of law. (CR. 19-40, 54).

On or about the 9th day of October, 1987, appointed counsel filed an initial brief on behalf of Petitioner raising three issues; however, the entire argument on appeal consisted of less than two typewritten pages. A Motion

for Leave to File Supplemental Brief, Request for Enlargement of Time and Notice of Appearance was filed by additional counsel with the Alabama Court of Criminal Appeals on or about the 27th day of October, 1987. Permission to file a supplemental brief was granted and additional time was allowed for preparation of the supplemental brief. The State of Alabama, by and through the Office of the Attorney General, filed its reply brief on or about the 18th day of December, 1987, although Petitioner's counsel was not served with a copy until December 28, 1987.

On April 12, 1988, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction on appeal without an opinion. An Application for Rehearing and Rule 39(k) Motion were filed in a timely fashion with the Court of Criminal Appeals. On May 10, 1988, the Application for Rehearing was overruled and the Rule 39(k) Motion was denied, each without an opinion.

On May 24, 1988, Petitioner filed a Petition for Writ of Certiorari with the Alabama Supreme Court and a Brief in Support thereof. The Petition for Writ of Certiorari was denied by the Supreme Court of Alabama on or about July 15, 1988 without an opinion.

REASONS FOR GRANTING THE WRIT

1. Whether the Petitioner's constitutional rights, as guaranteed under the Constitution of the State of Alabama and the United States Constitution, to a thorough and sifting cross-examination of the alleged victim was

violated by the trial court's unilateral denial of the Petitioner's line of cross-examination as to the motive underlying the alleged victim's testimony?

The Petitioner, Oscar Sims, respectfully submits that the Supreme Court of Alabama erred in affirming his conviction based upon the trial court's abuse of discretion by severely limiting defense counsel's cross-examination of the alleged victim. This issue was of paramount importance in that the alleged victim was the Petitioner's daughter. Furthermore, the Petitioner and his estranged wife were separated and in the process of obtaining a divorce at the time the allegations were made. Finally, on the night the alleged offense took place the Petitioner had informed his daughter that he intended to marry a much younger woman once the divorce became final. The trial court repeatedly sustained the State's objections to defense counsel's cross-examination of the prosecutrix concerning these circumstances, the Alabama Court of Criminal Appeals subsequently affirmed Petitioner's conviction without the benefit of an opinion, and the Supreme Court of Alabama denied Petitioner's Petition for Writ of Certiorari.

The right to extensive cross-examination of a governmental witness which is designed to reveal bias or prejudice of said witness is compelled by the confrontation clause of the Sixth Amendment of the United States. *United States v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977). The Sixth Amendment requirement is measured by a pragmatic, qualitative approach rather than a quantitative analysis; however, the defendant must be allowed an opportunity to expose facts to the jury from which they, as the sole triers of fact and credibility, may appropriately

draw inferences relating to the reliability of the witness. *United States v. Berkowitz*, 662 F.2d 1127 (5th Cir. 1981). When a cross-examination of a key witness by the defendant is cut off with respect to a crucial line of questioning concerning the witness' bias or motive to testify and her testimony is of crucial and perhaps determinative importance to the prosecution's case, the defendant is effectively precluded from examining the witness as to her motive for testifying against him in violation of the Sixth Amendment's mandate that some meaningful degree of cross-examination be allowed in the first instance. *Johnson v. United States*, 418 A.2d 136 (D.C. App. 1980).

Admittedly, the trial court has considerable discretion in limiting the scope and extent of cross-examination in a criminal trial but must not do so to the extent that the defendant's Sixth Amendment right of confrontation is impinged. *United States v. Hall*, 653 F.2d 1002 (5th Cir. 1981). It is a fundamental element of cross-examination that the defendant must be permitted to expose a witness' possible motivations for false testimony. *Id.*

In the case at hand, the Petitioner was effectively precluded from cross-examining the prosecutrix as to a possible bias, interest or motive for providing false testimony. It is clear, from the record, that a very strained relationship existed between the Petitioner and his daughter, the alleged victim. Not only were the parents of the alleged victim in the process of obtaining a divorce but the Petitioner had informed his daughter that once the divorce was final he intended to marry a much younger woman. Therefore, the questions attempted to be asked by defense counsel on cross-examination were wholly relevant to the issues of the trial and had a great

bearing on the credibility of the prosecutrix's testimony. Failure to allow such questioning denied Petitioner of his right to present to the jury a clear and concise picture of the facts and circumstances surrounding this case thus depriving the jury of essential information necessary for a fair and accurate deliberation in this cause.

Denial of the right of confrontation can be harmless only when it is harmless beyond a reasonable doubt and the remaining evidence must be overwhelmingly persuasive of the defendant's guilt. *State v. Olson*, 291 N.W. 2d 203 (Minn. 1980). In the instant case, the State's only evidence came from the alleged victim whom the Petitioner was not allowed to effectively cross-examine. Therefore, there can be no harmless error because there was no "remaining evidence".

For the aforementioned reasons, the Petitioner urges this Honorable Court to review the decision of the Alabama Supreme Court which denied Petitioner's Writ of Certiorari. Further, Petitioner prays that this Court will grant this Petition for Writ of Certiorari, proceed to review the matters complained of, and reverse the judgment of the Supreme Court of the State of Alabama.

2. Whether the Alabama Supreme Court failed to properly examine the Petitioner's claim that he was denied effective assistance of counsel in the trial court under the parameters as set forth in *Zuck v. State*, 588 F.2d 436, 440 which states "that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny".

The Sixth and Fourteenth Amendments to the United States Constitution guarantee reasonably effective assistance of counsel to a defendant in a criminal proceeding. This right is so vital to a fair trial that courts are compelled to examine every potential infringement of this right with the most exacting scrutiny. *Zuck v. State of Alabama,* 588 F.2d 436 (C.A.Ala. 1979), *rehearing denied,* 591 F.2d 102, *cert.den.* 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed. 2d 42. Petitioner contends that the Alabama Court of Criminal Appeals as well as the Supreme Court of the State of Alabama failed to comply with the requirements mandated by *Zuck,* therefore this Court should grant certiorari in this case and reverse the decision of the Alabama appellate courts. Petitioner contends that he has met the standard established in the case of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) thereby establishing his claim of ineffective assistance of counsel.

The first requirement under *Strickland* is that the Petitioner identify the acts or omissions of counsel which were outside the wide range of professionally competent assistance. Petitioner alleges that trial counsel failed to file sufficient and adequate pre-trial motions on his behalf, failed to request a directed verdict at the close of the State's evidence or prior to submission of the case to the jury, failed to request adequate and necessary jury charges, failed to make timely objection as to the jury instruction, failed to make appropriate objection to usage by the District Attorney of the word "rape", failed to make an offer of proof in connection with the limited cross-examination of the prosecutrix, and, finally, filed

such an inadequate initial Brief on Appeal that the ineffective assistance of counsel claim is virtually a per se violation of Petitioner's constitutional guarantees.

Prior to trial, defense counsel filed only one motion on behalf of Petitioner. (CR. 5-6). Notwithstanding the rule that counsel is not required to waste the Court's time with futile and frivolous motions, Petitioner urges that additional motions were necessary in this cause. *Cruse v. State*, 474 So.2d 106, *reversed ex parte Cruse*, 474 So.2d 109, *on remand* 474 So.2d 11 (Ala.Crim.App. 1984). At a minimum, defense counsel ought to have obtained a report from the social worker who was tangentially involved in the investigation of this offense. (R. 71). Defense counsel ought to have requested that the Court appoint a guardian ad litem to represent the interest of the alleged victim in this cause. An additional pre-trial motion that is mandated in cases of this nature is a Request for Disclosure of Psychiatric History and for psychological or other examinations of the alleged victim. This motion was particularly important in that the alleged victim was utilizing mental health facilities at the time of the trial. (R. 32).

Petitioner recognizes that objections to testimony or argument are matters of trial strategy and, absent a clear showing of improper and inadequate representation, are to be left to the judgment of trial counsel. *Haynes v. State*, 461 So.2d 869 (Ala.Crim.App. 1984). However, in this case, trial counsel failed to object to the District Attorney's continuous and prejudicial use of the word "rape" throughout the course of the trial and in the presence of the jury. (R. 18, 43, 48, 78, 99, 100, 102, 103). Defense counsel failed to object to the use of this word nor did he move to restrict or exclude references to this term. Each

of the statutory elements of the crime of rape must be proved beyond a reasonable doubt and to a moral certainty prior to conviction. Therefore, when the District Attorney repeatedly utilized the word "rape" she implanted within the minds of the jury that the burden of proof had been satisfied as to each element. Further, use of this word was inflammatory and prejudicial in the minds of the jury thereby depriving the Petitioner of a fair and impartial trial. Failure of defense counsel to object to this conduct, when considered in conjunction with other acts and omissions, demonstrates the ineffective assistance of counsel claim.

It is further demonstrated that Petitioner was denied effective assistance of counsel in that only one request for jury charge was submitted to the trial court. (CR. 15). The failure to request additional instructions, including those on the credibility of a child witness and potential lesser included offenses, effectively waived the Petitioner's right to assign error to the trial court's charge. Further, defense counsel's failure to make timely objection related to the inadequacy of the jury instruction again failed to properly preserve that issue for review and, arguably, waived the Petitioner's right to raise this issue on appeal.

An additional illustration of defense counsel's ineffectiveness at trial is based upon his failure to make an offer of proof in connection with the anticipated testimony of the prosecutrix. (R. 32-33). As addressed in the preceding issue, the trial court had consistently sustained the State's objections to defense counsel's attempt to conduct a thorough and sifting cross-examination of the alleged victim.

> "The rule is well established that when an objection is sustained to a question asked on cross-examination, the questioning party must make an offer of proof, calling the attention of the court to the expected answer and the materiality of the answer. Otherwise, the party cannot predicate an appeal upon the sustaining of the objection as an erroneous ruling."

Collins v. State, 364 So.2d 368, 372 (Ala.Crim.App. 1978). Defense counsel's failure to make the required offer of proof severely prejudiced Petitioner's rights on appeal.

Petitioner was further denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel by reason of his trial attorney's failure to request a directed verdict at the conclusion of the State's case and prior to submission of the case to the jury. (R. 47, 108). Even where defendant would not have been entitled to a ruling in his favor on a motion for directed verdict such motions should, as a matter of practice, be made. *Bonner v. State*, 389 So.2d 174 (Ala.Crim.App. 1980). While this failure may not have had a substantial impact on the outcome of these proceedings, it is imperative that this omission be considered in relation to the totality of the circumstances.

Lastly, Petitioner contends that the initial brief filed on his behalf in connection with this appeal clearly establishes ineffective assistance of counsel. The appellate brief is recognized as an element essential to effective representation. *Crawford v. State*, 479 So.2d 1349 (Ala.Crim.App. 1985). The initial brief filed on behalf of appellant addresses three issues which are argued in less than one and one half pages. There are only two cites to legal authority both of which were drawn from a treatise

entitled McElroy's Evidence, 3rd Edition. Such a brief would well fit into the parameters set forth in *High v. Rhay*, 519 F.2d 109 (9th Cir. 1975), which held that petitioner was denied effective assistance of counsel on appeal from a State court conviction where counsel filed a four page brief which was characterized by the court as worthless. Therefore, the inadequacy of the brief need not be further addressed as it is per se violative of the Sixth and Fourteenth Amendment guarantee of effective assistance of counsel as well as due process.

The second showing required under *Strickland, supra*, 466 U.S. 668, 687, is that the petitioner must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable". Further, the court held that the determination of whether counsel was ineffective must be based on the totality of the circumstances and the entire record. Petitioner contends that the foregoing outline of acts and omissions of trial counsel created cumulative prejudice to the extent that Petitioner's trial was reduced to a farce, sham and mockery. The State of Alabama, by and through the Attorney General's Office, has pointed out in previous briefs that "[a]ssuming arguendo, that counsel was actually ineffective, the defendant has failed to show that "but for" the alleged errors there is even a reasonable probability that the outcome would have been different". Taking that argument one step further, the Petitioner submits that "but for" the alleged errors committed at trial, which may have resulted in the Petitioner's waiver of same, the jury would have deliberated in excess of twenty eight minutes and he would currently be in a more optimistic posture concerning the success of his

post-trial remedies. In summary, the Petitioner submits that the foregoing errors, separately and severally, were so prejudicial as to require this Court to grant his Petition for Writ of Certiorari to the Alabama Supreme Court, and reverse said decision with instructions that this cause be remanded for a new trial.

CONCLUSION

Because the Alabama Supreme Court has failed to recognize the deprivation of Petitioner's constitutional rights as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution, this Court should grant Petitioner's Petition for Writ of Certiorari in this cause, reverse the decision of the Alabama Supreme Court and instruct that this matter is to be remanded for a new trial consistent with Petitioner's constitutional guarantees.

Respectfully submitted,

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Daphne, Alabama 36526
(205) 626-3120

No. ___

In The

Supreme Court of the United States

October Term, 1988

OSCAR SIMS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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APPENDIX A

IN THE SUPREME COURT OF ALABAMA

87-1001

OSCAR SIMS,

Petitioner-Appellant

vs.

STATE OF ALABAMA,

Respondent-Appellee

CERTIFICATE OF JUDGMENT OF THE SUPREME COURT OF ALABAMA DENYING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

(July 15, 1988)

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

July 15, 1988

87-1001

EX PARTE: OSCAR SIMS

PETITION FOR WRIT OF CERTIORARI

(Re: Oscar Sims v. State)

CCA 4/910

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

HOUSTON, J. – TORBERT, C.J., MADDOX, ALMON & BEATTY, JJ., CONCUR.

RECEIVED JUL 18, 1988

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appeal(s) of record in said Court.

Witness my hand this 15 day of July 1988.

/s/ (Illegible)
Clerk, Supreme Court of Alabama

APPENDIX B

STATE OF ALABAMA
COURT OF CRIMINAL APPEALS

4th Div.910

OSCAR SIMS,

Appellant,

vs.

STATE OF ALABAMA,

Appellee.

Order of the
Alabama Court of Criminal Appeals
overruling
Appellant's Application for Rehearing

(May 10, 1988)

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
MONTGOMERY 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

4th Div. 910

COVINGTON Circuit Court
CC 87-50

OSCAR SIMS
Appellant

vs.

State of Alabama
Appellee

Dear Sir:

You are hereby notified that on May 10, 1988 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

___ Notice of Appeal filed. Future correspondence should refer to the above number.

___ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____. As to briefs, see Rules 28, 31 and 32, A.R.A.P.

___ On motion, record on appeal accepted and considered as timely filed in this Court.

___ Appellant granted seven (7) additional days to file brief. Brief due on _____.

___ Appellee granted seven (7) additional days to file brief. Brief due on _____.

___ Appellant granted seven (7) additional days to file reply brief. Brief due on _____.

___ Brief of Appellant filed. ___Oral argument requested by appellant.

___ Reply brief filed.

___ Oral argument request disalllowed; appeal submitted on briefs.

___ Appeal submitted to the Court for Decision in the following manner:

___ Affirmed on appeal. No opinion. Judgment not final, see Rules 40 and 41, A.R.A.P.

___ Appeal dismissed. No Opinion.

___ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

___ Application for rehearing filed.

___ Application for rehearing overruled. No opinion. Judgment not final, see Rules 39 and 41, A.R.A.P.

xxx Application for rehearing overruled. Rule 39(k), A.R.A.P., motion denied. No opinion. Judgment not final, see Rules 39 and 41, A.R.A.P.

___ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

___ Appeal placed on rehearing ex mero motu.

___ Certificate of final judgment issued to circuit clerk.

___ /s/ Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS
OF ALABAMA

APPENDIX C

STATE OF ALABAMA
COURT OF CRIMINAL APPEALS

4th Div. 910

OSCAR SIMS,

Appellant,

vs.

STATE OF ALABAMA,

Appellee.

Order
of the
Alabama Court of Criminal Appeals
affirming
Petitioner's conviction
without an opinion

(April 12, 1988)

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
MONTGOMERY 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

RECEIVED APR 15, 1988

4th Div. 910

COVINGTON Circuit Court
CC 87-50

OSCAR SIMS vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on April 12, 1988 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

___ Notice of Appeal filed. Future correspondence should refer to the above number.

___ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____. As to briefs, see Rules 28, 31 and 32, A.R.A.P.

___ On motion, record on appeal accepted and considered as timely filed in this Court.

___ Appellant granted seven (7) additional days to file brief. Brief due on _____.

___ Appellee granted seven (7) additional days to file brief. Brief due on _____.

___ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____

___ Brief of Appellant filed.

___ Oral argument requested by appellant.

___ Reply brief filed.

___ Oral argument request disallowed; appeal submitted on briefs.

___ Appeal submitted to the Court for decision in the following manner:

xxx **Affirmed** on appeal. **No opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

___ Appeal **dismissed. No Opinion.**

___ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

___ Application for rehearing filed.

___ Application for rehearing **overruled. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

___ Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

___ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

___ Appeal placed on rehearing **ex mero motu.**

___ Certificate of final judgment issued to circuit clerk.

___

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

APPENDIX D

ALABAMA COURT OF CRIMINAL APPEALS

Circuit Court of Covington County, Alabama
Case No. CC-87-50

OSCAR SIMS,

Appellant,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL

(June 8, 1987)

AP 12-3 Letter of transmittal of Notice of Appeal to the Court of Criminal Appeals by Trial Clerk Printed and for Sale by Robert & Son, Birmingham

LETTER OF TRANSMITTAL OF NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS BY TRIAL CLERK

Oscar Sims	Offense Rape II
Appellant	Sentence Ten (10) Years
v.	Notice of Appeal June 8, 1987
STATE OF ALABAMA	Date Filed
Appellee	Judgment Entry June 8, 1987
	Date Entered

[XX] Oral notice of appeal has been given prior to or on the date of entry of the judgment of conviction in this cause,

[ ] Written notice of appeal has been filed on the date indicated hereon (within 42 days from the entry of judgment or the order overruling a post conviction motion).

A certified copy of the entry of record of the oral notice of appeal or the written notice of appeal is forwarded herewith for filing with the Court of Criminal Appeals.

I certify that I have served a copy of this letter of transmittal along with a copy of the notice of appeal on each of the following:

1. Court Reporter (Name and address) Ron Embry, Covington County Courthouse, Andalusia, AL 36420
2. Defendant

3. Defendant's appellate counsel. (Name and address) Larry R. Grissett, P.O. Box 423, Opp, AL 36467

4. District Attorney

5. Attorney General

DATED this 8th day of June, 1987.

/s/ Ray Bozeman
Circuit Clerk

APPENDIX E

IN THE CIRCUIT COURT OF COVINGTON COUNTY, ALABAMA

Case No. CC-87-50

STATE OF ALABAMA,

Plaintiff,

vs.

OSCAR SIMS,

Defendant.

Petitioner's Judgment of Sentence

(June 8, 1987)

IN THE CIRCUIT COURT OF COVINGTON COUNTY, ALABAMA

STATE OF ALABAMA, PLAINTFF, VS.	*	CASE NO. CC-87-50
OSCAR SIMS, DEFENDANT.	*	

This being the day regularly set for the sentencing of Defendant, the Defendant having been tried by a jury, found guilty, and duly adjudged guilty on the 29th day of April, 1987 of Rape in the Second Degree; and the Defendant being personally present and represented by his attorney and the State being represented by the District Attorney, and the report of the pre-sentence investigation ordered by the Court having been presented to the Court and the Defendant, the Court proceeds with the sentence hearing.

Neither party desiring to offer evidence in addition to the report of the pre-sentence investigation, the Court asks the defendant if he had anything to say as to why the judgment of the Court and the sentence of law should not be imposed upon him and the Defendant said nothing; and the Court having duly considered the report of the pre-sentence investigation is of the opinion that the Defendant should be imprisoned for a period of ten (10) years in the Penitentiary of the State of Alabama.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the said Defendant, Oscar Sims, be imprisoned in the Penitentiary of the State of Alabama for a period of ten (10) years and the Defendant was duly sentenced to said period by the Court. The Defendant is ORDERED to pay all Court costs, including

$25.00 to the Victim's Compensation Fund. Defendant is to receive credit for any time incarcerated on this charge.

The Court further advised the Defendant of his rights of appeal and the Defendant gave notice of appeal and asked for suspension of sentence. Sentence is hereby suspended and appeal bond is set at the sum of $10,000.00.

The Court determined the Defendant to be an indigent, the Honorable Larry Grissett is hereby appointed to represent him on appeal and a free transcript is hereby ORDERED to be prepared for the Defendant under the appropriate provisions of law.

Done in Office this the 8th day of June, 1987.

/s/ W. H. Baldwin
CIRCUIT JUDGE

APPENDIX F

IN THE CIRCUIT COURT OF COVINGTON COUNTY, ALABAMA

Case No. CC-87-50

STATE OF ALABAMA,

Plaintiff,

vs.

OSCAR SIMS,

Defendant.

Petitioner's Conviction

(April 29, 1987)

IN THE CIRCUIT COURT OF COVINGTON COUNTY, ALABAMA

STATE OF ALABAMA,	*	
PLAINTFF,	*	
VS.		CASE NO. CC-87-50
OSCAR SIMS,	*	
DEFENDANT.	*	

(Filed April 29, 1987)

This cause coming on for trial on this the 29th day of April, 1987 and comes the State of Alabama by and through its District Attorney of the 22nd Judicial Circuit, Honorable Eugenia Loggins, and comes the Defendant in his own proper person accompanied by his attorney of record, Honorable Larry Grissett, and came a jury of good and lawful people, to-wit: John R. Cook and eleven others and said cause proceeded to trial.

After hearing the evidence the jury returned the following verdict: "We, the Jury, find the Defendant guilty as charged. John R. Cook, Foreman."

Thereafter the Court asked the Defendant if he had anything to say as to why the judgment of the Court should not be imposed upon him and following the Defendant making a statement, the Court pronounced the Defendant, Oscar Sims, guilty of Rape in the Second Degree. The Defendant moved for a sentence hearing and the Court continued said cause to the 9th day of June, 1987 for sentence hearing. The Defendant is continued on his present bond until the holding of said sentence hearing.

It is further ORDERED and ADJUDGED by the Court that a pre-sentence investigation be made and the results

be available to the Court, the State and the Defendant at said sentence hearing.

It is further ORDERED by the Court that the State furnish to the Defendant and his cousel not later than June 4, 1987 written notice of any prior felonies which the State expects to offer under the Habitual Offender Act.

Done in Office this the 29th day of April, 1987.

/s/ W. H. Baldwin
CIRCUIT JUDGE

Supreme Court, U.S.
FILED
FEB 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-847

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

OSCAR SIMS,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

P. DAVID BJURBERG
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court dismiss this case where the petition for writ of certiorari was not timely filed?

2. Whether the petition for writ of certiorari states grounds which warrant this Court's review since the petition does not present a substantial federal question and does not allege a conflict between the decision below and controlling state or federal precedent?

3. Whether this Court should dismiss the petition for writ of certiorari because the questions presented are not new issues to this Court and where the Petitioner has other avenues of relief available where the alleged federal questions could be more fully developed?

PARTIES

The caption contains the names of all the parties in the court below.

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OPINIONS BELOW

1. On July 15, 1988, the Alabama Supreme Court denied Petitioner's petition for writ of certiorari, without opinion.

2. On April 12, 1988, the Alabama Court of Criminal Appeals entered an order affirming Petitioner's conviction, without an opinion.

3. Since Petitioner has reproduced these orders as Appendix A and B of the petition, Respondents have not duplicated that effort.

JURISDICTION

The Alabama Supreme Court denied Petitioner's petition for writ of certiorari on July 15, 1988. Petitioner was granted an extension of time in which to file a petition for writ of certiorari in this Court from September 13, 1988, to October 13, 1988. The petition was filed in this Court on November 21, 1988. Thus, it appears that the petition was not timely filed.

This Court has jurisdiction pursuant to 28 U.S.C. §1275(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner makes claims allegedly involving the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted in the Covington County, Alabama Circuit Court of rape in the second degree in violation of Code of Alabama 1975, §13A-6-62. Since there was no opinion below, Respondent will set forth a concise statement of facts concerning the crime from the state court transcript.

In November 1986, the Petitioner (thirty eight years old) separated from his wife and moved into a mobile home outside Florala, Alabama. (R.7,8) Petitioner's fifteen year old daughter

(Amy) and twelve year old son (Tim) remained in the home with their mother. (R.8) On November 20, 1986, Petitioner picked up his children from their house so that they could spend the night with him. (R.7-9) The Petitioner picked the children up around 11:00 p.m. and they all went to a laundromat to wash clothes. (R.9) After washing clothes, they went to Petitioner's trailer. (R.10)

Tim went to bed soon after arriving at the trailer but Amy and the Petitioner stayed up and talked. (R.10) At this time Petitioner informed Amy that he was going to marry his seventeen year old girlfriend. (R.10) Amy decided to go to bed after Petitioner told her about his marriage plans. (R.11) The Petitioner followed Amy back to the bedroom and sat on the bed talking to her. (R.12) A few

minutes later the Petitioner got into bed with Amy and put his arms around her. (R.13) The Petitioner asked Amy whether she wanted to make love. (R.14) Amy did not respond to this question. (R.14)

The Petitioner got out of the bed and went to the bathroom. (R.14) When the Petitioner came back he took his clothes off and got back in the bed with Amy and took her clothes off. (R.14-15) The Petitioner got on top of Amy and began kissing her. (R.15) The Petitioner then had sexual intercourse with his daughter. (R.15) At trial, Petitioner's daughter testified that the Petitioner "put his male parts inside of [her] female parts." (R.15) After the Petitioner finished, he told Amy not to tell anyone what had happened. (R.15) Amy was scared and just laid in the bed and did not say anything. (R.15)

The next day Amy and her brother got up and the Petitioner took them to school. (R.17) After Amy got to school she started crying and told her boyfriend what had happened. (R.17-18) The next day Amy's boyfriend persuaded her to talk to her pastor about what had happened. (R.18) The following Monday Amy told her mother what had happened. (R.19) The Petitioner was later arrested and charged with the rape of his fifteen year old daughter.

SUMMARY OF ARGUMENT

The Court should dismiss this cause because the petition was not timely filed and the Petitioner has given no reason for his failure to file in a timely manner.

Since the petition does not demonstrate that the Alabama Supreme Court's affirmance of Petitioner's conviction is in conflict with this Court's precedents and since the petition does not demonstrate that a substantial federal question is involved, this Court should not grant the writ.

The Court should also dismiss the writ because the questions presented are not new issues to this Court and no issue of national importance is presented. Further, this Court should dismiss the writ because Petitioner has other avenues of relief available where the alleged federal questions could be more fully developed.

ARGUMENT

I.

THE COURT SHOULD DISMISS THIS CASE BECAUSE THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED.

The Petitioner applies to this Court for relief from the denial on July 15, 1988, of a petition for writ of certiorari in the Alabama Supreme Court. (Petitioner's Appendix A). On September 20, 1988, this Court granted an extension of time for the filing of a petition for writ of certiorari from September 13, 1988, to October 13, 1988. The petition was not filed in this Court until November 21, 1988.

Under Rule 20.1 petitions for writ of certiorari must be filed within sixty days of the entry of judgment below. Rule 20.1 further provides that a Justice of this Court, for good cause shown, may

extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. In this case, the Petitioner was given an extension of time until October 13, 1988, to file a petition for writ of certiorari. The petition was not filed until November 21, 1988, therefore, it was not filed until after the extension of time had run.

The timely filing of a petition for writ of certiorari is not jurisdictional. Sanabria v. United States, 437 U.S. 54, 62 n.12 (1978). An untimely petition, however, should be accepted only for good cause shown. See Durham v. United States, 401 U.S 481 (1971). The Petitioner has presented no reason for his failure to file within the extension period allowed by this Court. The Court, accordingly, should dismiss the petition on the ground of untimeliness.

II.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT STATE GROUNDS WHICH WARRANT THIS COURT'S REVIEW SINCE THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND DOES NOT ALLEGE A CONFLICT BETWEEN THE DECISION BELOW AND CONTROLLING STATE OR FEDERAL PRECEDENT.

The two issues raised by Petitioner, limiting cross-examination of the victim and ineffective assistance of counsel, do not merit review by this Court because neither of them come within the perview of this Court's Rule Seventeen. In fact, no Rule Seventeen grounds have been stated in the petition.

The Petitioner's first assertion is that the Supreme Court of Alabama erred in affirming his conviction based upon the trial court's abuse of discretion by severely limiting defense counsel's cross-examination of the alleged victim. The Petitioner contends that he was

effectively precluded from cross-examining the prosecutrix as to a possible bias, interest or motive for providing false testimony. The Petitioner asserts that the failure to allow such questioning denied him of his right to present to the jury a clear and concise picture of the facts and circumstances surrounding this case thus depriving the jury of essential information necessary for a fair and accurate deliberation in this cause.

The Petitioner never presented a substantial federal question to the court's below and he is therefore precluded from attempting to raise a federal question to this Court. Although Petitioner asserted in the court's below that his right to a thorough and sifting cross-examination under the Sixth Amendment had been violated, the Petitioner relied on Alabama statutory law

(§12-21-137, Code of Alabama 1975) and Alabama case law to make this argument. (Appendix A) The Petitioner never set forth any federal cases to support his argument and never set forth facts supporting a constitutional argument. The first time Petitioner relied on federal cases was in his petition for writ of certiorari filed in this Court. The state courts have never decided an important question of federal law in this case, therefore, Petitioner has not set forth a Rule Seventeen ground for review.

The Petitioner's second assertion is that he was denied effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights. The Petitioner relies on Zuck v. State, 588 F.2d 436 (11th Cir. 1979) and Strickland v. Washington, 466 U.S. 668 (1984) to make this argument. The Petitioner contends

that the Alabama Supreme Court failed to properly examine his claim that he was denied effective assistance of counsel in the trial court under the parameters of Zuck v. State and Strickland v. Washington.

In essence, the petition asserts that the Alabama Supreme Court erred in its application of settled precedents to the facts of this case. As such, the petition fails to demonstrate that the lower court's affirmance of Petitioner's conviction is in conflict with this Court's settled precedents. Thus, there is no conflict under Rule Seventeen for this Court to review.

This ineffective assistance of counsel claim is due to be analyzed in the context of this Court's holding in Strickland v. Washington, 466 U.S. 688 (1984) and not, as the Petitioner asserts, under the exacting scrutiny standard of

the Eleventh Circuit Court of Appeals in Zuck v. State, 588 F.2d 436 (11th Cir. 1979). In Strickland v. Washington, this Court established standards required to be followed before a claim of ineffective assistance of counsel can be proven. There must first be a finding that acts or omissions of counsel amounted to actual ineffective assistance, this Court stated:

> "The convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the

> same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Secondly, in order to constitute a violation of Petitioner's Sixth Amendment right to effective counsel, a showing of prejudice must be made.

> "The defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

The determination of whether counsel was ineffective must be based on the totality of the circumstances and the entire record. Strickland v. Washington, supra; Baty v. Balkcom, 661 F.2d 391, 394 (5th Cir.Unit B, 1981), cert denied, 456 U.S. 1011 (1982).

In this case, Petitioner contends that his trial counsel failed to file sufficient and adequate pre-trial motions, failed to request a directed verdict, failed to request adequate and necessary jury charges, failed to make timely objection to the jury instruction, failed to make appropriate objection to usage of the word "rape", failed to make an offer of proof in connection with the limited cross-examination of the prosecutrix, and filed an inadequate brief on appeal. Respondent submits that Petitioner's allegations are without merit. Most of the matters objected to by Petitioner are matters of trial strategy and, as this Court is aware, matters of trial strategy are properly left to the judgment of the trial counsel and will support a reversal only where there is a clear showing of inadequate representation. Strickland,

supra; Sinclair v. Washington, 814 F.2d 1516 (11th Cir. 1987). There has been no such showing by Petitioner in the present case. Further, Respondent submits that none of Petitioner's allegations which amount to pure conjecture of what trial counsel could have done amount to "actual ineffectiveness." The Petitioner has also failed to show that "but for" the alleged errors there is even a reasonable probability that the outcome would have been different. Even if trial counsel had pursued all of the avenues suggested in the petition such would not have been enough to "undermine confidence in the outcome of the proceeding." Therefore, this Court should deny the petition.

III.

THIS COURT SHOULD DISMISS THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE QUESTIONS PRESENTED ARE NOT NEW ISSUES TO THIS COURT AND WHERE THE PETITIONER HAS OTHER AVENUES OF RELIEF AVAILABLE WHERE THE ALLEGED FEDERAL QUESTIONS COULD BE MORE FULLY DEVELOPED.

The two issues raised by Petitioner are not new issues to this Court and since the petition does not request this Court to overrule or modify well settled law in these areas, the petition amounts to nothing more than a request to correct perceived errors of the application of facts to settled law. Given this Court's limited time and resources, this Court should refuse to grant the writ in a case such as this one where no issue of national importance is presented, where no request is made to overrule or modify this Court's precedents, and where this Court

will be required to review the trial transcript since there were no opinions rendered by the Court's below.

Further, this Court should dismiss this petition so that Petitioner can pursue other avenues of relief available to him in order to more fully develop the alleged federal questions. In this case, there are no opinions below for this Court to consider because the Alabama Supreme Court denied the Petitioner's petition for writ of certiorari without opinion and the Alabama Court of Criminal Appeals affirmed the conviction without opinion. Should this Court grant the petition for certiorari in this case, it would have to go to the trial transcript to determine the merits of the questions presented. It would be more expedient for this Court to dismiss the petition and allow the

Petitioner to file a 42 U.S.C. §2254(b) action and have the lower federal courts develop a record and determine whether the Petitioner has presented federal questions for this Court to consider. This would give this Court opinions to reach its decision from rather than take this Court's time and effort to search through a state trial transcript. Therefore, this Court should dismiss the petition for writ of certiorari.

CONCLUSION

Respondents respectfully submit that this Court should dismiss the petition for writ of certiorari. Since the petition was not timely filed, since Petitioner does not assert that the lower court applied incorrect legal standards to the facts of his case, since Petitioner is not asking the court to overrule or modify any of this Court's precedents, and since Petitioner has other avenues of relief available to him, this Court should deny the petition.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL

APPENDIX

APPENDIX A

PETITIONER'S ARGUMENT IN BRIEF FILED ON DIRECT APPEAL TO THE ALABAMA COURT OF CRIMINAL APPEALS THAT THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE ALLEGED VICTIM.

ISSUEI: THE TRIAL COURT ERRED TO REVERSAL BY UNILATERALLY DENYING THE APPELLANT HIS RIGHT TO A THOROUGH AND SIFTING CROSS EXAMINATION OF THE STATE'S WITNESS.

Oscar Sims, the appellant herein, respecfully urges that the court below erred to reversal based upon its failure to allow him to conduct a thorough and sifting cross examination of the State's witness. This particular issue is extremely critical in this cause in that the appellant and his estranged wife were separated and in the process of obtaining a divorce when the accusations were made against him. The trial court repeatedly denied defense counsel the right to cross

examine the alleged victim in connection with the divorce proceeding and/or her feelings in connection with said proceedings. The appellant argues that the trial court abused its discretion by sustaining each and every objection entered by the State in connection with the questioning dealing with the divorce.

The Code of Alabama, Section 12-21-137, guarantees the right of a thorough and sifting cross-examination for every party as to the witnesses called against him. While certain discretion is placed in the trial judge to determine the extent of the cross-examination, such a right is fundamental and constitutional and a limitation or cut-off of same creates an extremely perilous situation. Ball v. State, 337 So.2d 31 (Ala.Crim.App.), cert.quashed, 337 So.2d 39 *Ala. 1976). Not only is this right

granted by statute but it is also guaranteed by Article I, Section 6 of the Constitution of Alabama and by the Sixth Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the United States Constitution and any limitation on its fundamental guarantee will be closely scrutinized on appeal. Hembree v. City of Birmingham, 381 So.2d 664 (Ala.Crim.App. 1980).

In the case at hand, on each occasion that defense counsel attempted to introduce evidence demonstrating the alleged victim's bias, the State objected and each objection was sustained. This pattern and practice denied the defendant his constitutional and statutory right to a thorough and sifting cross-examination of the only witness called to testify against him. A careful reading of the

record reveals that the allegations against appellant, Oscar Sims, arose once he informed his wife that he intended to divorce her and marry a younger woman. Defense counsel was repeatedly prevented from presenting to the jury the attitude of the alleged victim toward her father's contemplated marriage thus precluding defense counsel from proving the alleged victim's inherent bias in her testimony.

Further, defense counsel was overruled in his attempt to introduce prior inconsistent statements of the alleged victim based upon previous sworn testimony given at the appellant's, Oscar Sims, divorce proceeding. The transcript was marked as an Exhibit in this trial however was not made available to the jury for use in it's deliberation.

While the range and extent of cross-examination of a witness lies within

the sound discretion of the trial court the question or line of questioning must carefully be reviewed by the appellate court to determine whether an undue restriction has been applied. Weaver v. State, 407 So.2d 568 (Ala.Crim.app. 1981). In the case at hand, the cross-examination sought by the appellant was based upon exposing the bias of the State's witness, the alleged victim, and to establish the prior inconsistent statements made by the "star" witness. The consistent deprivation by the trial court of the defendant's right to present to the jury a clear and concise picture of the mindsets of the primary actors in this case denied them, the jury, a necessary piece of their fact finding puzzle.

The appellant, Oscar Sims, therefore respectfully urges that he was

prejudiced by the trial court's disallowance of testimony that was relevant and material to his defense. He was further denied the right to an adequate confrontation of the witness against him and an opportunity to expose that witness' bias and prejudice. For the foregoing reasons, Oscar Sims urges that this cause be reversed and remanded for a new trial.

CERTIFICATE OF SERVICE

I, P. David Bjurberg, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve the requisite number of copies of this brief on the attorney for the Petitioner by placing a copy in the United States mail, postage prepaid, and addressed as follows:

Hon. Lynn E. Quinley
Post Office Box 967
Daphne, Alabama 36526

This _____ day of February, 1989.

P. DAVID BJURBERG
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